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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DR. ERNEST B. TERRELL, ET AL., Petitioner

v.

LAMAR ALEXANDER, ET. AL., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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September 10, 1986

58 pp

QUESTIONS PRESENTED

1. Whether petitioner had standing to appeal as the named class representative of a subclass in a class action even though he had lost his "personal stake" in the outcome of this case and whether dismissal by the Court of Appeals of Petitioner's appeal for such lack of standing is in direct conflict with decisions of this Court and decisions of other Circuits?
2. Whether the decision in the Court of Appeals below conflicts with due process standards established by this Court and with the interpretation of Fed. R. Civ. P. 23(e) as applied by other Circuit Courts of Appeal?

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DR. ERNEST B. TERRELL, ET. AL[1] ., Petitioner

v.

LAMAR ALEXANDER, ET. AL[2]., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner Dr. Ernest B. Terrell, on behalf of himself and all students at Tennessee State University, and black residents of the State of Tennessee similarly situated, respectfully prays that a Writ of Certiorari issue to review the dismissal of Petitioner's appeal by the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 12th, 1986.

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[1] The Petitioners in this case are Dr. Ernest B. Terrell, (representative of one of the original subclasses in the original action) on behalf of himself and all students at Tennessee State University, and black residents of the State of Tennessee similarly situated.

[2] Respondents in this Petition include: Rita Sanders Geier, (representa-

tive of one of the original subclasses involved in the original action), a citizen and resident of the State of Tennessee, and a citizen of the United States who at the initiation of the original suit was a faculty member at Tennessee A&I State University, and who sued on behalf of herself and all other university faculty members and staff similarly situated, as well as all black residents of the State of Tennessee; Raymond Richardson, Jr. and Hughland Richardson, infants by their Parent and Next Friend Raymond Richardson; Stanford Strong, Jr., Godfrey Strong, and Jeff Strong, infants by their Parent and Next Friend Stanford Strong; Derrick Harris, infant, by his Guardian and Next Friend Mrs. Claudia Adams; Osmond Robinson, LaNell Robinson, Vanetta Robinison and Jared Robinson, infants, by their Parent and Next Friend, James Robinson; Rutherford Overton, Roscoe Overton, Jr., and Marva Overton, infants, by their Parent and Next Friend Roscoe Overton; David L. Acey, II, and Carolyn M. Biven, infants, by their Parent and Next Friend Mrs. Yvonne B. Acey; Joseph C. Simmons, Bryan E. Simmons, Alexis Fay Simmons and Dara Kaye Simmons, infants, by their Parent and Next Friend Jospeh S. Simmons; Darryl Buford, Gerald Buford, Rhond Buford and Terryl Buford, infants, by their Parent and Next Friend Frank A. Buford; Fred Bell, John Bell and Phillip Bell, infants, by their Parent and Next Friend Rev. Ezekiel Bell; Alice Vanessa Coleman, infant by her Parent and Next Friend Mrs. Juanita Coleman; Audrey Fletcher and Theodore R. Fletcher, infants, by their Parent and Next Friend Mrs. Beatrice Fletcher; Malissa Michelle Moore, infant by her Parent and Next Friend Tyrant Moore; Kathryn L.J. Sanford; Desaree Bowers and Montrice Bowers, infants, by their Parent and Next Friend Mrs. Kathryn I. Bowers; Vasco A. Smith, III, infant by his Parents and Next Friends Vasco A. Smith, Jr., and Mrs. Maxine Smith; Angela Mapp. Tony Mapp, Alice Mapp and Ivanette Mapp, infants by their Parent and Next Friend James R. Mapp; Carlmon Payne, Vincent Payne, Frank Payne and Pitt Payne, infants, by their Parent and Next Friend Mrs. Janice Payne; Cheryl Johnson and Carl E. Johnson, Jr., infants by their Parent and Next Friend Carl E. Johnson, Sr., Juvetia Adams and Yulunda Adams, infants, by their Parent and Next Friend Foster L. Adams; Rickie L. Pearson; Mary Ann Myles; Mrs. Barbara Drake; Donald Campbell; Sterlin Adams; Harold J. Smith; Mrs. Joan Elliott; Mrs. Sammye J. Wynn; Raymond Richardson; Robert Bozeman; Dwight Bonds; Roscoe Overton; Joseph S. Simmons; George A.

Dowdy; Rev. Ezekiel Bell; Minerva J. Johnican; Stanford Strong; Robert Smith; Herman E. Jackson; Mrs. A. Leola Barton; Irvin L. Willis; Foster L. Adams; Mrs. Beatrice Fletcher; Mrs. Juanita Coleman; Mahlon Griffith; Mrs. Kathryn Bowers; Mrs. C.E. McGruder; Mrs. Claudia Adams; Warren N. Moore; James Robison; Mrs. Yvonne B. Acey; Frank A. Buford; Tyrant Moore; Mrs. Janice Payne; Charles E. Johnson; Vasco A. Smith, Jr.; Maxine Smith; James R. Mapp; Rev. Alfred Dewayne Hill; Mrs. Mary Lee Seymour; Mrs. Verneidl Hines; Mrs. Clyde T. Bardwell; Mrs. Gwendolyn Kiles; Rev. Samuel B. Kiles; Walter Evans; Thomas J. Troope; Harold A. Cohn, all of whom intervened collectively in 1972; the United States of America; H. Coleman McGinnis, Paul Dubois, John Arthur, Ethel Robertson, Harry Fuchs, Lyle McLevain, Darlene Marsh, Martin Deschenes, Delores Pierce, Millicent Yeargin, all of whom intervened collectively in 1983; Lamar Alexander, Governor of the State of Tennessee and Chairman of the Board of Trustees of the University of Tennessee and Chairman of the State Board of Regents; Robert McElrath, Commissioner of Education of the State of Tennessee; the Tennessee State Board of Education and its Chairman Nelson Andrews; the Tennessee Higher Education Commission and its Chairman, Walter Price; the University of Tennessee and its President, Edward J. Boling; the Board of Trustees of the University of Tennessee and its Vice-Chairman, Ben Kimbrough; Tennessee State University and its President, Dr. Otis Floyd; all named persons in their official capacities. (Other original subclasses involved in the original action are no longer active parties in interest, namely; Patrick J. Gilpin, a citizen and resident of the State of Tennessee, and a citizen of the United States, who at the initiation of the original action was on the teaching staff at the University of Tennessee, Nashville Extension, who sued on behalf of himself and all other white residents of the State of Tennessee, as well as faculty and staff members similarly situated at the University of Tennessee, Nashville Extension; Harold Sweatt, a citizen and resident of the State of Tennessee, and a citizen of the United States who at the initiation of the original action was a senior student at the Wilson County High School intending to enroll as a student at Tennessee A&I State University, who sued on behalf of himself and all other black students, and black residents of the State of Tennessee similarly situated; and Phillip Sweatt, as the father and next friend of Harold Sweatt who also sued on behalf of himself and all other black parents in the State of Tennessee, and black residents similarly situated).

OPINION BELOW

The Court of Appeals below dismissed the Petitioner's appeal without opinion. (Appendix A). The District Court dismissed, without opinion, Petitioner's Motion to hear his objections to the Stipulation of Settlement approved by the District Court on September 25, 1984. (Appendix B). The District Court also denied, without opinion, Petitioner's motion to substitute counsel. (Appendix C). The opinion of the District Court approving the Stipulation of Settlement is reported at 593 F.Supp. 1263.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit dismissing Petitioner's appeal was entered on June 12, 1986. A Motion for an extension of time to file a Motion for Reconsideration along with a Motion for Reconsideration was denied, and the Motion for Reconsideration was not heard. This Petition for Certiorari was filed within 90 days of the date Petitioner's appeal was dismissed. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

Rule 23(e) of the Federal Rules of Civil Procedure: Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

This lawsuit was filed in 1968 pursuant to 42 U.S.C §2000 c-2000 c-9, §401-410 of the Civil Right Act of 1964 and the Federal Declaratory Act, U.S.C. §2201, 2202, in an effort to dismantle the dual, segregated system of public higher education in Tennessee. The original plaintiffs included four subclasses: Rita Sanders (now Rita Geier), faculty member at Tennessee A&I State University (hereinafter "Tennessee A&I") now Tennessee State University, (hereinafter "TSU"); Patrick J. Gilpin, faculty member at the University of Tennessee, Nashville (hereinafter "UTN"); Harold Sweatt, then a student at Wilson County High School intending to enroll at Tennessee A&I; Philip Sweatt as next friend and parent of Harold Sweatt; and Petitioner here, Ernest Terrell, a student then enrolled at Tennessee A&I. Petitioner Terrell, as with all the other original plaintiffs, also sued as representatives of the subclass of which they were members, with Petitioner Terrell acting as class representative for students enrolled at Tennessee A&I. Attorney George Barrett was counsel for all plaintiffs as well as for the classes they represented.[3]

The proceedings from 1968 through 1980 involved various orders by the District Court ordering the integration of traditionally white institutions at a "constitutionally permissable rate of speed." **Geier v. Dunn**, 337 F.Supp. 573, 580 (M.D. Tenn. 1972). By 1977, the Court found that desegregation was moving slowly and ordered the merger of TSU with the predominantly white UTN in order to speed the dismantling of the dual system. **Geier v. Blanton**, 427 F.Supp. 644, 660 (M.D. Tenn. 1977). That decision was appealed by defendants Tennessee

[3] Although never formally certified as a class action, this case has been treated by the courts as a class action since the inception of the lawsuit, and relief has been granted as a class.

Higher Education Commission and UTN and the Sixth Circuit Court of Appeals affirmed. This Court denied a petition for certiorari. **Geier v. University of Tennessee**, 597 F.2d 1056 (6th Cir. 1979), **cert. denied**, 444 U.S. 886, 100 S.Ct. 180, 62 L.Ed.2d 117 (1979).

In 1980, plaintiff-intervenors Richardson, et. al., filed a motion for further relief, contending that the slow progress of desegregating the state's predominantly white schools had stopped. Additional motions for further relief were filed in 1981 by the original plaintiffs and in 1983 by plaintiff-intervenors McGinnis, et al. contending in part that the merger of UTN and TSU was not succeeding and that TSU was in fact resegregating.

On July 30, 1984, a tentative settlement was reached by the attorneys allegedly representing the parties involved. That agreement, the Stipulation of Settlement, was approved by the District Court on September 25th, 1984 after a hearing on the objections of the United States Department of Justice. **Geier v. Alexander**, 593 F.Supp. 1263 (M.D. Tenn. 1984) The hearing did not include the Petitioner's subclass which had received no notice or opportunity to be heard.

Dr. Terrell, a named plaintiff and class representative for the subclass of students enrolled at TSU, was never consulted with respect to the Stipulation of Settlement by the attorney representing the original four classes of plaintiffs. Indeed, Dr. Terrell was not even aware of such Settlement, as no attempt was made by the Court or anyone to notify him as representative of his subclass. Nevertheless, immediately upon hearing of the Stipulated Settlement, Dr. Terrell attempted to have his objections heard by the District Court, by letter of October 18, 1984. (Appendix G). In his letter, Dr. Terrell stated that he was unfamiliar with the contents of the Stipulation of Settlement, and asked for the opportunity to consult with counsel so he could more formally note

his objections to the Settlement. Subsequently, on November 14, 1984 Dr. Terrell filed a Motion formally notifying the Court of his objection to the Settlement agreement. (Appendix E.). In a separate Motion, he also requested that Richard E. Jackson be substituted as his counsel replacing George Barrett. (Appendix F). On November 16, 1984, both of the Motions filed by Terrell were summarily denied by the District Court without comment. (Appendix B and C). Thereafter, Terrell filed an appeal to the United States Court of Appeals for the Sixth Circuit, seeking review of the District Court's refusal to hear his objections. (Appendix D).

On appeal, plaintiff/appellants Raymond Richardson, Jr. et al. and plaintiff/appellees Rita Geier, et al. moved the Court to dismiss Dr. Terrell's appeal pursuant to Rule 27 of the FRAP and Rule 8 of the United States Court of Appeals for the Sixth Circuit. Rule 8 of the Rules of the Sixth Circuit provides that motions to dismiss ordinarily may not be filed for other than jurisdictional grounds. As grounds for dismissal, both movants argued lack of standing, though plaintiff/appellees Rita Geier also argued for dismissal on the grounds that Dr. Terrell was not a lawyer and thus could not serve as counsel for the class members he allegedly represented.

In opposition to the Motions to dismiss, Dr. Terrell argued that he was not trying to represent the class as their counsel, but rather was merely trying to preserve their claim as their representative. With respect to standing, Dr. Terrell submitted that he had standing as the only viable representative of his subclass, TSU students, irrespective of any personal stake he may still have. The court of Appeals for the Sixth Circuit granted Richardson's and Geier's motions to dismiss. (Appendix A).

On June 25th, Petitioner Terrell filed a Motion for an extension of time to file a Motion for Reconsideration.

During the pendency of that Motion, Petitioner Terrell filed a Motion for Reconsideration and in addition filed a Motion to substitute Gregory Carr, the current president of the Student Government Association at TSU as named class representative in the event Dr. Terrell was determined to be an inadequate representative of the subclass of students at TSU. (Appendix H). Mr. Carr filed his Affidavit stating his desire to represent the subclass **(Id.)** Petitioner's Motion for an extension of time was denied, and thus his Motion for Reconsideration was not considered.

Dr. Terrell petitions for a Writ of Certiorari only for the dismissal of his appeal by the Sixth Circuit, and not for matters involving the Motion for Reconsideration.

REASONS FOR GRANTING THE WRIT

1. PETITIONER HAD STANDING TO APPEAL AS THE NAMED CLASS REPRESENTATIVE OF A SUBCLASS IN THIS CLASS ACTION EVEN THOUGH HE HAD LOST HIS "PERSONAL STAKE" IN THE OUTCOME OF THIS CASE, AND DISMISSAL BY THE COURT OF APPEALS OF PETITIONER'S APPEAL FOR LACK OF STANDING IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND DECISIONS IN OTHER CIRCUITS.

INTRODUCTION

The first issue presented by Petitioner for review before this Court is whether a class action becomes moot as to all parties upon the loss of a "personal stake" by the named representative of a particular class. More specifically, does Petitioner, Dr. Ernest Terrell have standing to appeal the summary denial of his

attempt on behalf of his subclass to have his objections heard with respect to the Stipulation of Settlement approved by the District Court. Petitioner respectfully submits that the Sixth Circuit's dismissal for lack of standing of Petitioner's claim is in direct conflict with applicable decisions of this Court. In addition, Petitioner submits that the lack of clear parameters on the question of mootness in class actions is creating such conflict among the Circuits, and indeed the decisions of this Court are becoming so irreconcilable that it is appropriate for this Court to address these questions in the context of Petitioner's claim. Petitioner Ernest Terrell respectfully requests that this Court grant his Petition for a Writ of Certiorari.

ARGUMENT

The Sixth Circuit did not provide its reasons for dismissing Petitioner's appeal, merely saying that "upon consideration of the motions [to dismiss] of appellees Richardson and Geier...the appeal is dismissed." Appendix A). However, upon review of appellees' motions and briefs, it is clear that lack of standing was the Court of Appeal's grounds for dismissal, for that is the only contention both motions had in common, and the Court referred to the motions of both appellees.[4] Petitioner submits that the decisions of this Court mandate the conclusion that Petitioner does have standing, and that despite his loss of a "personal stake" in this class

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[4] In addition to standing, appellee Geier also argued that Dr. Terrell was improperly representing his class on the grounds that he was not a lawyer. As Motions to Dismiss in the Sixth Circuit are ordinarily only granted for lack of jurisdiction (Rule 8 of the Rules of the Sixth Circuit Court of Appeals), Petitioner believes this issue did not figure into the Sixth Circuit's decision.

litigation, this action is not moot.

Conflict With Supreme Court Decisions

In **United States Parole Commission v. Geraghty**, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed2d 479 (1980), this Court held that though the named plaintiff and putative class representative had lost his individual stake in the outcome of his suit, the controversy remained alive for "at least some members of the class respondent seeks to represent." 445 U.S. at 396, 100 S.Ct. at 1208. In **Geraghty**, a prisoner filed a class action contesting the legality of federal parole release guidlelines. The District Court denied class certification and then granted summary judgement for the defendants. Geraghty appealed both the denial of class certification and the decision on the merits. Before the case reached the Supreme Court, Geraghty had been released, and thus, his "personal stake" in the action had expired. This Court noted two aspects for mootness:

> When the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.

445 U.S. at 396, 100 S.Ct. at 1208.

This Court found with respect to the first prong that:

> It is clear that the controversy over the validity of the Parole Release Guidelines is still a 'live' controversy between petitioner and **at least some members of the class respondent seeks to represent.**

445 U.S. at 396, 100 S.Ct. at 1208 (emphasis added). This Court concluded that the question of who is to represent the class is a separate issue, and remanded the case to the District Court to determine whether Geraghty should continue to represent his class or whether another representative would be appropriate. 445 U.S. at 407, 100 S.Ct. at 1205.

In the instant case, Petitioner Terrell is also a named

plaintiff and class representative, for the subclass of students enrolled at TSU (formally known as Tennessee A&I State University) who were victims of Tennessee's segregationist policies which gave rise to this complex litigation. As with **Geraghty**, Petitioner's personal stake in this action has become moot in that eighteen years after this action was begun, he is, not surprisingly, no longer a student at TSU. Though Petitioner does have a niece now enrolled there, and a brother who is a faculty member (the faculty at TSU were also an original subclass in this action), Petitioner concedes for purposes of this argument that he no longer has standing to pursue his own claim, and this action is moot **as to him**. However, it is clear from **Geraghty** that even an uncertified class has the right to have its claim appealed by its named class representative, even though that representative has no standing to pursue his individual claim. Indeed, the case at bar is even stronger than the one presented in **Geraghty** in that **Geraghty** involved an **uncertified** class which had never gained recognition as a class. There, the mere right to appeal the denial of certification was enough to give standing to a class representative who had lost his personal stake.

Here, Petitioner Terrell seeks to preserve the claim of his subclass by attempting to have their objections heard by the District Court, a District Court which has approved a Stipulation of Settlement granting Petitioner's subclass relief **as a class.** As **Geraghty** abandons the necessity for class certification originally set forth in **Sosna v. Iowa**, 419 U.S. 393, 399, 95 S.Ct. 553, 42 L.Ed.2d 532, 541 (1975), it is mandated by this Court's decision in **Geraghty** that the class this Petitioner seeks to represent, by virtue of the fact that it has been granted relief **as a class**, should not have had its appeal dismissed merely because its named

class representative no longer had a "personal stake" in this action's outcome.

Petitioner also represents a class which asserts a claim capable of repetition but evading review, at least with respect to the repeated harm done to students as a class at TSU. **Sosna v. Iowa**, 419 U.S. at 400-401, 95 S.Ct. at 558, 42 L.Ed.2d 532 (1975). Students by their very nature are transient, and even a student who brings suit in his freshman year would be hard-pressed to see through a complex civil rights case, even if he stayed more than the ordinary four years. Clearly, as with **Geraghty** and **Sosna**, Petitioner represents a class which for reasons beyond its control, is having tremendous difficulty being heard.

Lest Respondents were to argue that **Geraghty** is distinguishable because new prisoners who were to be affected by the guidelines had moved to intervene, Petitioner would only note that Petitioner moved to substitute Gregory Carr, the current representative of the Student Government Association at TSU for himself when his Motion for Reconsideration was filed. (Appendix H). Mr. Carr filed his affidavit stating his interest and willingness to represent the subclass. **(Id.)** Such motion was not heard due to the Sixth Circuit's denial of Petitioner's Motion for Extension of Time to file for Reconsideration.

Clearly, there is a "live controversy" between Respondents and other participants in the Stipulation of Settlement and students formerly and currently enrolled at TSU. The District Court recognized this in its opinion approving the Stipulation of Settlement, saying:

> During the pendency of this matter there has been a march of TSU students on the courthouse, public statements by student leaders, and letters to the editor by faculty members...

Geier v. Alexander, 593 F.Supp. 1263, 1267 (M.D. Tenn.

1984). However, when those students' class representative attempted to make their voice formally heard, the District Court denied his Motion to state his objections, and to substitute counsel, even though the subclass' attorney George Barrett was no longer representing their interests.

In conclusion, Petitioner submits that the Sixth Circuit's dismissal of Petitioner's appeal as class representative for the subclass of students at TSU was in direct conflict with **Geraghty** and other applicable decisions of this Court. On these grounds alone, Petitioner respectfully submits that his Petition for a Writ of Certiorari be granted.

Conflict with Circuit Court Decisions

Petitioner would also show that the Sixth Circuit's dismissal of this appeal is in conflict with decisions in other Circuits. In addition, Petitioner respectfully submits that opinions of this Court and other lower Courts are irreconcilable on the issue of mootness presented by this case, and that the parameters of the "flexible" approach to mootness is an important question of federal law which this Court has not yet settled, but needs to be settled.

At least one commentator has noted the fact that there are a "plethora of opinions concerning the viability of class claims following the mootness of the named plaintiff's claims." 1 H. Newberg, **Newberg on Class Actions**. Section 2.33 at p. 123 (2d.ed. 1985 & Supp. 1986). Indeed, this Court acknowledged the "somewhat confusing" and "irreconcilable" Supreme Court opinions on the issue of mootness. **Geraghty**, 445 U.S. at 406, n 11, 100 S.Ct. at 1213, n 11.

Newberg, in his treatise on Class Actions discussed

the reasons for this confusion:

> Judicial interpretation of the mootness doctrine generally displays a tension between the goals of the class device and the unwillingness to reduce the named plaintiff to figurehead status by diluting the requirement that the putative class representative have a tangible personal stake in the outcome of the suit throughout the entire litigation. This concern is also evident in disputes over the adequacy of representation in class certification determinations, as courts vacillate between class counsel and the named plaintiff as primary targets of an analysis of the requirement. In both cases, judicial uneasiness seems to reflect an aversion to counsel-controlled litigation...

1 H. Newberg, **Newberg on Class Actions**, Section 2.33 at p. 122 (2d ed. 1985 & Supp. 1986).

It is Petitioner's belief that this litigation has become counsel-controlled, and that George Barrett does not represent the interests of Petitioner's class.

Cases in this Court which are difficult to reconcile with **Geraghty** include **Board of School Commissioners v. Jacobs**, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975) (per curiam), **Weinstein v. Bradford**, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed. 2d 350 (1975) (per curiam), and **Pasadena City Bd. of Education v. Spangler**, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed. 2d 599 (1976). In **Jacobs**, dismissal of the putative class suits was ordered after the named plaintiffs' claims became moot. The lower court had not complied with the requirements of Fed. R. Civ. P. 23(c) by not properly identifying the class it was attempting to certify. In **Weinstein**, the trial court denied certification when the class representative's claims were moot. Finally, in **Spangler**, an action was filed as a class action and treated as such though never formally certified, and the Court indicated that "the action would have been moot upon the expiration of the plaintiff's

claims had not the United States intervened as a party plaintiff." **Geraghty**, 445 U.S. at 400, n 7, 100 S.Ct. at 1211 n 7. One Court has suggested that these cases "appear in fact, to have been effectively overruled." **Berry v. Pierce**, 98 FRD 237, 242 (E.D. Tex. 1983).

Conflict within the Circuits is evidenced by **Willard v. Ciccone**, 507 F.2d 1 (8th Cir. 1974) (Petitioner not an appropriate class representative since he had been transferred to a different facility after the action had been filed); **Heard v. Mueller Company**, 464 F.2d 190 (6th Cir. 1972) (Plaintiff no longer a member of the defendant company or the Steelworkers bargaining unit, and thus could not provide proper representation of the class he sought to represent); **Huff v. N.D. Cass Co.**, 468 F.2d 172 (5th Cir. 1972) (Discharged employee not entitled to reinstatement was not an appropriate representative of black employees of the defendant company); **Jackson v. Schweiker**, 683 F.2d 1076 (7th Cir. 1982) (Though plaintiff's claim may have been mooted by the time the appellate court decided the appeal, there was still a case or controversy in the claims of the certified class sufficient to decide the appeal—case remanded to determine plaintiff's right to continue as representative). See also **Davis v. Bull Memorial Hosp. Assn., Inc.**, 753 F.2d 1410 (7th Cir. 1985), **Chu Drua Cha v. Noot**, 696 F.2d 594 (8th Cir. 1982) and **Carpenter v. Stephen F. Austin State Univ.**, 706 F.2d 608 (5th Cir. 1983).

In conclusion, though it is indisputable that a plaintiff must have individual standing to **bring** a legal action, whether in an individual or representative capacity, it is not clear whether the same threshold requirement must be satisfied **throughout** the action by the named plaintiff in a class action. **Geraghty** strongly suggests that a named plaintiff need not retain his "personal stake" to avoid mootness, and if this Court agrees, Petitioner respectfully submits that it should grant certiorari because the

Sixth Circuit's dismissal of the case at bar is in direct conflict with this Court's ruling. If this Court finds this question to be unsettled, then pursuant to Rule 17 of the Rules of the Supreme Court, this Court should grant certiorari to settle that question.

Important rights such as the right to notice and due process are at stake. Petitioner merely seeks to preserve the claim of the class he represents, either in his own capacity or, if another representative is more appropriate, then Petitioner will step aside. In any event, the subclass of students at TSU, who are the parties who will be most affected by the recent Stipulation of Settlement should at the very least have their objections heard and be represented by counsel who in their opinion, will best represent them. Therefore, as the Sixth Circuit's dismissal of Petitioner's appeal as the named representative of his subclass was in conflict with decisions of this Court, and presents important unsettled questions of federal law, Petitioner respectfully submits that its Petition for a Writ of Certiorari be granted.

2. THE DECISION BELOW CONFLICTS WITH DUE PROCESS STANDARDS ESTABLISHED BY THIS COURT AND WITH THE INTERPRETATION OF FED. R. CIV. P. 23(e) AS APPLIED BY OTHER CIRCUIT COURTS OF APPEAL.

INTRODUCTION

The right of named and absentee parties in class action litigation to receive notice of a proposed settlement and the opportunity to be heard is the nexus of the instant controversy. The denial of fundamental due process

rights permeates the proceedings of the District Court and is implicitly condoned in the Sixth Circuit decision dismissing Petitioner's claim. The interpretation and application of Fed. R. Civ. P. 23(e) (hereinafter "Rule 23(e)") by the courts involved in this proceeding conflicts in principle with the decisions rendered in other Circuits and the denial of due process which underlies the lower courts' actions violates standards long-established by this Court. Petitioner respectfully suggests that this Court resolve this conflict and articulate more precise standards relevant to due process considerations inherent in Rule 23(e) pertaining to Rule 23(b)(1) and (2) class action litigation.

It is significant to note that if the due process rights of Petitioner and the subclass had been satisfied by the District Court, the present controversy would not have arisen. Furthermore, by providing such due process, the public policy purpose of class action litigation (judicial expediency in deciding large number of claims) and the policies favoring settlement and finality of decision would have been fostered. Consideration of this matter by the Court would both alleviate significant conflicts which this case presents and promote the public policy of consistent and expeditious judicial administration in the class action area.

ARGUMENT

Importance of the Issue

Unlike the relative certainty of the notice requirements related to a Rule 23(b)(3) action, as articulated by this Court in **Eisen v. Carlisle & Jacqueline**, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 32 (1974), the due process protections afforded to Rule 23(b)(1) and (2) parties are subject to the broad and subjective language of Rule 23 (e). Such broad language invites abuse and a more precise

articulation of the Rule 23(e) due process standards is needed to insure the protection of future class action litigants. The distinction between the notice requirements of Fed. R. Civ. P. 23(b)(3) and 23(b)(1) and (b)(2) has been criticized by some commentators. In fact, some courts have suggested that the strict "best notice practicable" standard be applied to the latter category of litigants. **Franks v. Kroger Company**, 649 F.2d 1216, 1227 (6th Cir. 1981) (concurring opinion). There is a need for a uniform rule on this issue because of the broad impact inherent in class actions and the essential safeguards Rule 23(e) must provide.

Rule 23(e) states that "a class action **shall** not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise **shall** be given to all members of the class in such manner **as the court directs.**" (emphasis supplied). The statutory language indicates that notice is mandatory, yet the method of achieving such notification (i.e. "as the court directs") is not defined. The Sixth Circuit has stated that "this language provides the courts with 'virtually complete discretion' in selecting the kind of notice to employ in order to inform class members of a settlement hearing." **Franks v. Kroger**, 649 F.2d at 1222-23.

However, this "complete discretion" must be limited by basic due process considerations which Rule 23(e) is intended to assure. Although the Advisory Committee Notes on Rule 23(e) shed little light upon the mechanics of the Rule, it has been recognized that the "special function" of the Rule is "to assure that any person whose rights would be affected by a dismissal or compromise has the opportunity to contest the proposed action." **Pearson v. Ecological Science Corp.**, 522 F.2d 171, 176-77 (5th Cir. 1975). (Quoting 7A C. Wright & A. Miller, **Fed'l Practice and Procedure,** §1797, at 234 (1972)). Although a court may properly exercise its discretion in

establishing the **form** of notice in the 23(b)(1) and (2) class action, some form of notice is mandatory. **Walsh v. Great Atlantic & Pacific Tea Co.**, 726 F.2d 956, 962-3 (3rd Cir. 1983).

The procedures utilized by the lower courts in the present controversy stand in direct conflict with the holdings of other circuits. There was no notice at all given in this case. Moreover, by couching its decision in terms of "standing," the Sixth Circuit has established a far-reaching precedent which renders the due process question presented in this case likely to be repeated but incapable of review. The form and extent of Rule 23(e) notice, the rights of original parties to substitute the named class action plaintiff and to substitute counsel, and the fiduciary duties of both counsel and the court to absentee class members are important questions which require the attention of this Court. The circumstances of the present controversy, by no means uncommon, present an appropriate context in which the above issues can be appropriately addressed.

Conflict with Supreme Court Decisions

The procedures utilized by the lower court in this case contradict the basic due process guidelines established by this Court. The due process standard that "notice" must satisfy has been articulated by this Court as a procedure which "fairly insures the protection of the interests of absent parties who are to be bound by (the judgement)." **Hansberry v. Lee**, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). The most frequently cited case regarding due process requirements of notice is **Mullane v. Central Hanover Bank & Trust Co.**, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

339 U.S. at 314, 70 S.Ct. at 657.

In the instant controversy, the lower courts exceeded the permissable boundaries of the "complete discretion" standard enunciated in **Franks v. Kroger, supra** in that rather than tailoring the form of notice to the circumstances of the case, it required no notice at all. Such inaction is an egregious violation of fundamental due process rights and highlights the need for this Court to consider the question and establish a better defined Rule 23(e) due process standard. While it is true that in some class action cases (usually involving dismissals rather than settlements) notice has not been required by the courts, such instances are rare and are justified because absent class members have neither been prejudiced nor have they relied upon the adequate representation of the named plaintiff. See, **Larkin General Hospital LTD v. AT&T**, 92 FRD 497 (ED Pa. 1982).

Such is not the situation in the instant controversy. The subclass most affected by the settlement, the students, are bound by the provisions of the settlement which will determine the racial composition of their institution and more importantly the manner in which such composition will be achieved. Petitioner is their named representative and he has a fiduciary duty to adequately represent the class until replaced by an appropriate substitute. Receiving no notice of the proposed settlement, Petitioner was precluded from participating in the settlement until after its approval. Similarly, the subclass received no notice and justifiably relied upon their interests being advanced by the Petitioner. The result is that although

the subclass has significant objections to the settlement, it has been denied a formal channel through which to build an evidentiary record. The lower court was thus unable to properly exercise its discretion in approving the settlement.

This chronology of events contradicts the due process standards articulated in **Hansberry** and **Mullane, supra**, and evidences a standard of law which not only injures the hundreds of students in the subclass, but also threatens the due process rights of all future absent class members in this and other class action suits who will be bound by decisions of the Sixth Circuit and lower courts in adherence to this dangerous precedent.

Conflict with Courts of Appeal Standards

The actions of the District and Sixth Circuit Courts in this matter are not only contrary to the due process standards articulated by this Court but also contradict the holdings of other circuits. See, **McArthur v. Southern Airways, Inc.**, 556 F.2d 298, 302 (5th Cir. 1977); **Holmes v. Continental Can Co.**, 706 F.2d 1144, 1147 (11th Cir. 1983); **Mandujano v. Basic Vegetable Products Inc.**, 541 F.2d 832 (9th Cir. 1976); **Grunin v. Int'l House of Pancakes**, 513 F.2d 114, 120-21 (8th Cir.) **cert. denied**, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); **Walsh v. Great Atlantic & Pacific Tea Co.**, 726 F.2d at 962-3. As noted by Newberg in his definitive treatise, **supra** at Section 11.59, p. 486, "Appellate Courts have rejected District Court's approvals of settlement in cases where the lower court acted without sufficient facts concerning the proceedings, failed to permit the objector the right to develop an independent evidentiary record...(and) where there was lack or inadequacy of notice."

After the settlement had been approved and formally

announced, Petitioner notified the District Court of his objection to the settlement based upon his lack of notice and subsequently moved for a hearing on his objection and the substitution of counsel. Both motions were summarily rejected in conflict with holdings in other circuits that "original plaintiffs ... should be given the opportunity to retain a new counsel to represent them in objecting to the settlement and to be heard in opposition." **Flinn v. FMC Corp.**, 528 F.2d 1169, 1174, n. 19 (4th Cir. 1975). **See, Pettway v. American Cast Iron Pipe Co.**, 576 F.2d 1157, 1178-79 (5th Cir.) **cert. denied** 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1978), **Saylor v. Lindsley**, 456 F.2d 896, 899-90 (2nd Cir. 1972). **Ace Heating & Plumbing Co. v. Crane Co.**, 453 F.2d 30, 33-4 (3rd Cir. 1971).

As a result, Petitioner filed his notice of appeal in the Sixth Circuit in an attempt to preserve the claim of the subclass (Appendix D). Having been denied in his request to substitute counsel by the District Court, Petitioner's attempt to substitute parties was never considered by the Sixth Circuit (Appendix H). However, the duty of adequate representation of absent class members does not rest solely upon the named representative. The court must take an active role in the administration of the case. As stated in **Newberg on Class Actions, supra** at Section 8.18, p. 133;

> When a class denial or dismissal of the plaintiff's claims may serve to prejudice absent class members and foreclose any meaningful opportunity for the class to obtain redress...the disqualified plaintiff may request that the court, **or the court may on its own motion**, direct notice to the class to determine if a qualified representative is available to substitute for the plaintiff. (emphasis supplied).

Because of the binding effect of class action litigation upon absentee parties, special duties are placed upon the

participants. Both the court and class counsel share a fiduciary duty "to ensure that absent class members have knowledge of the proceedings in which a final judgment may directly affect their interests." **Greenfield v. Village Industries**, 483 F.2d 824 (3rd Cir. 1973). The court has an "independent obligation" to provide absentee class members with notice prior to a settlement and failure to so comply is reversible error. **McArthur v. Southern Airways Inc.**, 556 F.2d at 302. Furthermore, a "compelling obligation" rests upon class counsel that he be **aware** of and motivated by the best interests of the class which he represents. **Parker v. Anderson**, 667 F.2d 1204, 211 (5th Cir.) **cert. denied**, 459 U.S. 828, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982). The Sixth Circuit's failure to recognize such duties is irreconcilable with the holdings of other circuits. More importantly, such failure presents a serious problem for the viability of class action litigation which will be recurrent and yet evade review unless this Court establishes the appropriate standards.

In order to protect absentee class members, Rule 23(e) requires court approval of compromise settlements in a class action. Although the Rule contains no standard for such approval, it is now established that the court must find the settlement "fair, adequate and reasonable." **Bennet v. Behring Corp.**, 737 F.2d 982, 986 (11th Cir. 1984). **Miller v. Republic National Life Ins. Co.**, 559 F.2d 426 (5th Cir. 1977). This statutory mandate that the court oversee and protect the interests of the class is bolstered by the general equitable powers of the court. **Zients v. Lamorte**, 459 F.2d 628 (2nd Cir. 1972). In the exercise of its discretion in approving a settlement, the Court must consider a number of factors, including "the respective opinions of the participants, including class counsel, class representative, and absent class members" and the "probability of the plaintiff's success on the merits." **Parker v. Anderson**, 66 F.2d at 1209.

Consideration of these and other factors forcefully indicate that the Rule 23(e) requirement of notice is intricately related to the proper exercise of the court's discretion in approving a settlement.

In the instant controversy, the opinions of the class representative and absentee class members were neither considered nor solicited. The advocacy of their interests in the negotiations and subsequent approval of the settlement depended solely upon the class attorney who failed to communicate with either the named representative or absentee class members. The class attorney also represented three other distinct subclasses.

The absentee class members, students at TSU, relied upon the adequate representation by Petitioner, who was involuntarily precluded from any involvement in the settlement. Petitioner attempted to gain access to the District Court in fulfillment of his obligations as class representative immediately upon learning of the settlement. His efforts were unsuccessful and his subclass thereby denied the opportunity to offer evidence pertaining to the standards by which a class action settlement is approved. It should be noted that the United States also objected to the settlement and has been able to pursue such objections in the Sixth Circuit.

The decision of the trial court in approving the settlement was based upon its knowledge of the record and proceedings and the opinions and recommendations of a few attorneys. Although the recommendations of counsel may carry great weight, "the degree of deference given counsels opinions depends, however, upon the posture of the case and upon the amount of dissent within the 'client' class." **Holmes v. Continental Can Co.**, 706 F.2d 1144 (11th Cir. 1983). Furthermore, although the assent of the class representative to a proposed settlement is not mandatory, the attorney is not "the **dominus litis** and the plaintiff only a key to the courthouse." **Saylor v. Lindsley**,

456 F.2d at 899-900 (court's emphasis). It appears from the record that although the original plaintiffs, including Petitioner, were the driving force behind the attack upon the dual system of education in Tennessee, they soon became mere "keys" to the courthouse and their rights and interests were negotiated and settled without any consultation. Although **Saylor v. Lindsley, supra,** was a derivative stockholders suit, the duties of the plaintiff's attorney is comparable to the class action attorney.

> The attorney remains bound to keep his client fully informed of settlement negotiations, to advise the client before signing a stipulation of settlement on his behalf, and, if the client has objected, to inform the court of this...so that it may devise procedures whereby the plaintiff, with a new attorney, may himself conduct further inquiry.

Id.

The failure of a class attorney to properly perform his role in the class action litigation results in a mere "rubber stamping" by the court rather than the careful scrutiny which is essential in judicial approval of class action settlements." **Holmes v. Continental Can Co.,** 706 F.2d at 1150.

The lower court's failure to conduct a hearing on the proposed settlement also precluded it from considering the relative merits of the subclass' claim as related to the fairness of the settlement. This action directly conflicts with the procedures of other circuits. In **Armstrong v. Bd. of School Directors,** 616 F.2d 305 (7th Cir. 1980), the court noted that the review of a class action settlement proposal is a two step process. First, the court makes a threshold determination as to whether the proposal is within the range of possible approval. If it is, a fairness hearing is conducted in which all possible parties have the opportunity to be heard. It should be noted that "in school desegregation cases ... hearings on proposed

remedies are almost universally held and it may well be an abuse of discretion not to conduct one." **Mendoza v. United States**, 623 F.2d 1338, 1348, n. 8 (9th Cir. 1980).

It is only through such a hearing that due process can be insured and finality of decision achieved. Most circuit courts acknowledge that only through a settlement hearing can an adequate record be established to justify the discretionary decision of the trial court. As stated in **Plummer v. Chemical Bank**, 668 F.2d 654, 659 (2nd Cir. 1982), "when a district court approves a settlement which is not based upon 'well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, its decision will not survive appellate review." (quoting **Protective Committee v. Anderson**, 390 U.S. 414, 434, 88 S.Ct. 1157, 1168, 20 L.Ed.2d 1 (1968)). **See, Flinn v. FMC Corp.**, 528 F.2d at 1173 (4th Cir. 1975). In the instant controversy the lower court ignored this requirement by approving the settlement without providing any forum whatsoever in which objections (other than those of the United States Justice Department) could be heard. It should be noted that such a forum can be specifically tailored according to the peculiarities of the case so that a forum for objections need not result in unnecessary expenditure of expense or time. **Id.**

Although an actual hearing is not required in all circumstances, minimum due process standards set by Rule 23(e) dictate that adequate notice be given of a proposed settlement so as to afford interested parties the opportunity to voice their objections and present their evidence. **Calhoun v. Cook**, 487 F.2d 680, 683 (5th Cir. 1973). The notice must "convey the required information and afford a reasonable time for those interested to make their appearance." **Grunin v. International House of Pancakes**, 513 F.2d at 120-21. By not providing such notice, the lower court has violated the due process rights of the absentee class members. **Air Lines Stewards & Stewardesses**

Association, Local 550 v. American Airlines, 455 F.2d 101 (7th Cir. 1972), **Reynolds v. National Football League**, 584 F.2d 280, 285 (8th Cir. 1978).

In conclusion, the proceedings of the lower courts in this controversy stand in conflict with well established standards of due process articulated by this Court and are contrary to Rule 23(e) applications applied by other circuit courts of appeal. The wide latitude which has been read into the language of Rule 23(e) invites such abuse and the lack of a uniform standard of interpretation threatens substantial injury to all present and future parties in Rule 23(b)(1) and (2) class action litigation. Therefore, Petitioner respectfully requests that the Court grant his application for Writ of Certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Sixth Circuit dismissing Petitioner's appeal.

Respectfully submitted,

Richard E. Jackson
Attorney for Petitioner
Suite 200—Jefferson Plaza
939 Jefferson Street
Nashville, Tennessee 37208

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of Sept, 1986, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to George E. Barrett, 217 Second Avenue North, Nashville, Tennessee 37201; Avon N. Williams, Jr. and Richard H. Dinkins, 203 Second Avenue North, Nashville, Tennessee 37201; Nathaniel Douglas, Levern Younger and Miriam R. Eisenstein, Room 7732, General Litigation Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530; Aleta Arthur and John Norris, Hollins, Wagster and Yarbrough, P.C., 8th Floor, Third National Bank Building, Nashville, Tennessee 37219; Julius Chambers, Joel Berger and Theodore M. Shaw, 99 Hudson Street, 16th Floor, New York, New York 10013; and R. Stephen Doughty and Richard L. Colbert, Assistant Attorneys General, 450 James Robertson Parkway, Nashville, Tennessee 37219-5025; Carl A. Cowan, 1100 Crestview St., S.E., Knoxville, Tennessee 37915; Lewis Laska, 901 Church St., Nashville, Tennessee 37203; Julian Blackshear, Jr., 1000 Parkway Towers, Nashville, Tennessee 37219; Juanita Logan Christian, Suite 230 Hart Block Bldg. 730 W. Main St., Louisville, Kentucky, 40202; Beauchamp Brogan, University of Tennessee, 810 Andy Holt Tower, Knoxville, Tennessee 37916; John Drinnon, Jr., Assistant General Counsel, Administrative Bldg., University of Tennessee, Knoxville, Tennessee, 3 916; and Charles Fried, Solicitor General, U.S. Dept. of Justice, Washington, D.C. 20530, counsels for respondents. I further certify that all parties required to be served have been served.

Richard E. Jackson
Suite 200—Jefferson Plaza
939 Jefferson Street
Nashville, Tennessee 3 208

APPENDIX

No. 84-6124

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RITA SANDERS GEIER, ET AL.,)

Plaintiffs-Appellees,)

DR. ERNEST B. TERRELL,)

Plaintiff-Appellant,)

UNITED STATES OF AMERICA,)

Plaintiff-Intervenor,)

RAYMOND RICHARDSON, Jr.)
ET. AL.,)

Plaintiff-Intervenor-Appellee)

vs.)

LAMAR ALEXANDER, ET. AL.,)

Defendants-Appellees)

FILED

JUN 12 1986

JOHN P. HEHMAN, Clerk

ORDER

BEFORE: LIVELY, Chief Judge; MILBURN, Circuit Judge; and PECK, Senior Circuit Judge

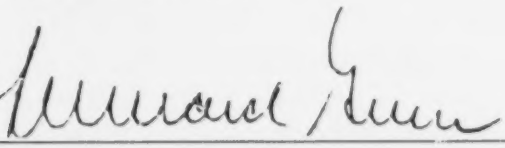
Upon consideration of the motions of appellees Richard-

son and Geier to dismiss this appeal.

And further considering appellant's response,

It is ORDERED that the motions be and they hereby are granted and the appeal is dismissed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk



Leonard Green, Chief Deputy

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RITA SANDERS GEIER, ET. AL.)

Plaintiffs,)

UNITED STATES OF AMERICA,)

Plaintiff-intervenor,)

RAYMOND RICHARDSON, Jr.,)
ET. AL.,)

Plaintiff-Intervenors,)

COLEMAN McGINNIS, ET. AL.,)

Plaintiff-Intervenors,)

v.

LAMAR ALEXANDER, ET. AL.,)

Defendants.)

FILED

NOV 14 1984

CLERK

BY DEPUTY CLERK

NO. 5077

Judge Thomas A. Wiseman, Jr.

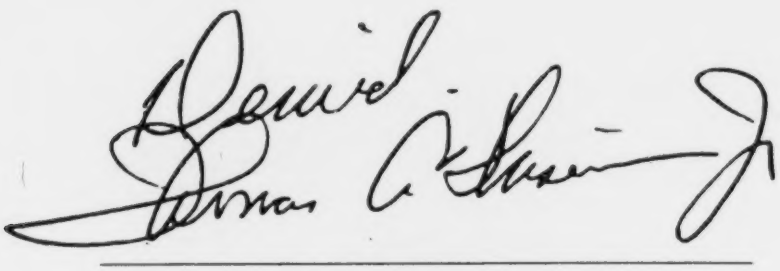
MOTION FOR RULING UPON PREVIOUSLY FILED OBJECTIONS TO THE PROPOSED SETTLEMENT AGREEMENT

Dr. Ernest B. Terrell, as a representative of a subclass of the original class of plaintiffs in the above-styled action, appears herein by the undersigned, Mr. Richard E. Jackson, his attorney, and moves the court as follows:

1. To rule upon the October 18, 1984 objection of Dr.

Ernest Terrell to the proposed settlement agreement; or

2. To set a hearing date for the purpose of ruling on the October 18, 1984 objection of Dr. Ernest Terrell to the proposed settlement agreement.



Denied
signed by District Court Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RITA SANDERS GEIER, ET. AL.,)

Plaintiffs,)

UNITED STATES OF AMERICA,)

Plaintiff-Intervenor,)

RAYMOND RICHARDSON, JR.,)
ET. AL.,)

Plaintiff-Intervenors,)

COLEMAN McGINNIS, ET. AL.,)

Plaintiff-Intervenors,) NO. 5077

v. Judge Thomas A. Wiseman, Jr.

LAMAR ALEXANDER, ET. AL.,)

Defendants.

FILED

NOV 14 1984

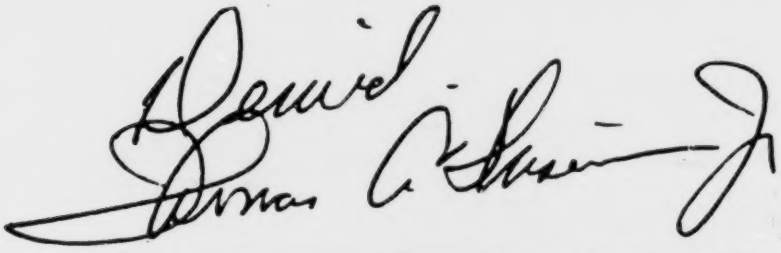
CLERK

BY DEPUTY CLERK

MOTION AND NOTICE FOR ORDER SUBSTITUTING ATTORNEYS

Dr. Ernest B. Terrell, as representative of a subclass of the original plaintiff class, moves the court for an order substituting Mr. Richard E. Jackson, of 939 Jefferson Street, Suite 200, Nashville, Tennessee 37208, as the attorney of record for him and the subclass which he represents herein, in place of Mr. George E. Barrett,

on the grounds that Dr. Terrell desires such substitution and that he believes that his interests and the interests of the sub-class will be best served by such substitution.



Denied
signed by District Court Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

RITA SANDERS GEIER, ET. AL.,)
)
Plaintiffs)
)
UNITED STATES OF AMERICA,)
)
Plaintiff-Intervenor,)
)
RAYMOND RICHARDSON, JR.,)
ET. AL.,)
)
Plaintiff-Intervenors,)
)
COLEMAN McGINNIS, ET. AL.)
)
Plaintiff-Intervenors,)
)
v.)
)
LAMAR ALEXANDER, ET. AL.,)
)
Defendants,)

FILED

DEC 17 1984

CLERK

BY_____
DEPUTY CLERK

No. 5077

Judge Thomas A. Wiseman

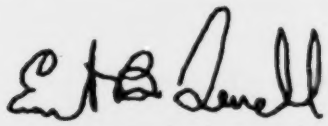
NOTICE OF APPEAL

Notice is hereby given that Dr. Ernest B. Terrell, as representative of a subclass of the original plaintiff class, hereby appeals to the United States Courts of Appeals for the Sixth Circuit from the District Court's denial of requests for relief dated November 16, 1984, in which the movant requested that the District Court rule

upon objections to the proposed settlement of the above-referenced action, and that the movant be allowed to obtain new counsel. Said action on the part of the court has had the effect of imposing, without notice, upon the sub-class which movant represents a settlement which movant believes is not in its best interest without having an opportunity to voice objection thereto.

Dated December 12, 1984.

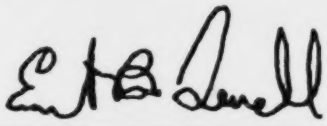
Respectfully Submitted.



ERNEST B. TERRELL, M.D.
P.O. Box 1254
Martinsburg, W.V. 25401
Plaintiff

CERTIFICATE OF SERVICE

I, Dr. Ernest B. Terrell, acting as my own counsel in the above-entitled action, hereby certify that on the 11th day of December, 1984, I served the attached, via mail, on the following: George E. Barrett, 217 2nd Ave. No., Nashville, TN 37201, Atty. for Plaintiffs, Levern M. Younger & Nathaniel Couglas, Civil Rights Division, Department of Justice, Washington, D.C. 20530, Aleta Arthur & John Norris, 8th Floor, Third National Bank Bldg., Nashville, TN 37219, Avon Williams, Jr., & Richard H. Dinkins, 203 2nd Ave. No., Nashville, TN 37201, Julius Chambers, Joel Berger & Theodore M. Shaw, 99 Hudson St., 16th Floor, New York, N.Y. 10013, Attorneys for Plaintiff-Intervenors, Raymond Richardson, et.al., and W.J. Michael Cody, Atty. General and Reporter, 450 James Robertson Parkway, Nashville, TN 37219-5025.



ERNEST B. TERRELL, M.D.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

RITA SANDERS GEIER, ET. AL.,

Plaintiffs,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

RAYMOND RICHARDSON, JR., ET. AL.,

Plaintiff-Intervenors,

COLEMAN McGINNIS, ET. AL.,

Plaintiff-Intervenors,

v.

LAMAR ALEXANDER, ET. AL.,

Defendants.

FILED

NOV 1 1 1984

CLERK

BY _____ DEPUTY CLERK

NO. 5077

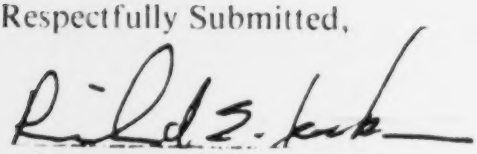
Judge Thomas A. Wiseman, Jr.

MOTION FOR RULING UPON PREVIOUSLY FILED OBJECTIONS TO THE PROPOSED SETTLEMENT AGREEMENT

Dr. Ernest B. Terrell, as a representative of a subclass of the original class of plaintiffs in the above-styled action, appears herein by the undersigned, Mr. Richard E. Jackson, his attorney, and moves the court as follows:

1. To rule upon the October 18, 1984 objection of Dr. Ernest Terrell to the proposed settlement agreement; or
2. To set a hearing date for the purpose of ruling on the October 18, 1984 objection of Dr. Ernest Terrell to the proposed settlement agreement.

Respectfully Submitted,



RICHARD E. JACKSON
MANSON, JACKSON & ASSOCIATES
939 Jefferson St., Suite 200
Nashville, TN 37208
(615) 254-1600

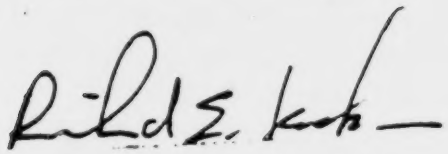
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

RITA SANDERS GEIER, ET. AL.,	)	
	)	FILED
Plaintiffs,	)	
	)	NOV 14 1984
UNITED STATES OF AMERICA,	)	
	)	CLERK
Plaintiff-Intervenor,	)	
	)	BY _____ DEPUTY CLERK
RAYMOND RICHARDSON, JR., ET. AL.,	)	
	)	
Plaintiff-Intervenors,	)	
	)	NO. 5077
COLEMAN McGINNIS, ET. AL.,	)	Judge Thomas A. Wiseman, Jr.
	)	
v.	)	
	)	
LAMAR ALEXANDER, ET. AL.,	)	
	)	
Defendants.	)	

MOTION AND NOTICE FOR ORDER SUBSTITUTING ATTORNEYS

Dr. Ernest B. Terrell, as representative of a subclass of the original plaintiff class, moves the court for an order substituting Mr. Richard E. Jackson, of 939 Jefferson Street, Suite 200, Nashville, Tennessee 37208, as the attorney of record for him and the subclass which he represents herein, in place of Mr. George E. Barrett, on the grounds that Dr. Terrell desires such substitution and that he believes that his interests and the interests of the sub-class will be best served by such substitution.

Respectfully Submitted,



RICHARD E. JACKSON
939 Jefferson St., Suite 200
Nashville, TN 37208
(615) 254-1600

Honorable Thomas A. Weisman, Jr.
Chief Judge
U.S. District Court
Middle District Tennessee
800 U.S. Court House
Nashville, Tenn. 37203

Dear Judge Weisman:

This letter is sent concerning **Geier et al v. Alexander et al**, Civil Docket No. 5077.

As a representative of the subclass of plaintiff class, I would like to state my unfamiliarity with the agreement that has been reached in this case. On these grounds, I would hereby indicate my formal **objection to this settlement**; ask for an additional period of time to consult with counsel to file the necessary documents needed to more formally express my disapproval of this settlement; and to prevent this settlement from being implemented as an agreed order with leave for appeal if any of my prayers are denied.

Your cooperation concerning this matter is much needed and greatly appreciated.

Sincerely,



Ernest B. Terrell, M.D.

STATE OF WEST VIRGINIA;
COUNTY OF BERKELEY:

Taken, subscribed and sworn to before the undersigned authority by Ernest B. Terrell, M.D. in the County aforesaid this 18th day of October, 1984.

Notary Public

My commission expires September 17, 1985.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERNEST TERRELL, et al., Plaintiffs-Appellants,	)	
	)	No. 84-6124
v.	)	
LAMAR ALEXANDER, et. al., Defendants-Appellees.	)	

MOTION FOR SUBSTITUTION OF PARTY

Dr. Ernest B. Terrell herein shows the court as follows:

1. On December 17, 1984, the above named appellant filed a notice of appeal to this court from the order denying Plaintiff-Appellant Dr. Ernest B. Terrell request that the District Court rule upon objections to the proposed settlement of the above-referenced action, and that the movant be allowed to obtain new counsel in the United States District Court for the Middle District of Tennessee—Nashville Division.

2. In 1968 Ernest Terrell was named as a plaintiff in the original lawsuit. **Geier v. Lamar Alexander** which sought to dismantle the segregated dual system of higher education in the State of Tennessee. At that time he was identified in the complaint as:

> "A citizens and resident of the State of Tennessee and a citizens of the United States. He is presently enrolled and is a student at Tennessee A&I State University. He sues on behalf of himself, and all students enrolled at Tennessee A&I State University, as well as all Negro residents of the State of Tennes-

see similarly situated, which classes are too numerous to bring before the Court. Plaintiff being a member of the Negro race."

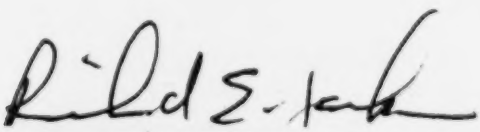
3. Dr. Terrell has graduated from Tennessee A&I now called Tennessee State University. (See attached affidavit)

4. Each year the students at Tennessee State University elect a Student Government Association president, the present president (Gregory Carr) is willing to be the representative of the sub-class of students. (See attached affidavit.)

Wherefore pursuant to the provisions of Rule 43(b) of the Federal Rules of Appellate Procedure, Dr. Ernest Terrell moves the court for an order substituting the present (and future) president(s) of the Tennessee State University Student Government Association in lieu of himself as the named party in the above-entitled appeal.

Dated July 9, 1986

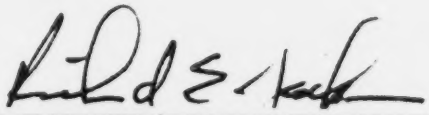
Respectfully submitted by,



Richard E. Jackson
Attorney for Plaintiff-Appellant
Dr. Ernest B. Terrell
Suite 200—Jefferson Plaza
939 Jefferson Street
Nashville, Tennessee 37208

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing MOTION TO APPEAR AS ATTORNEY FOR DR. ERNEST B. TERRELL, as Plaintiff-Appellant has been served on each of the following: Mrs. Aleta G. Arthur, 31 Wentworth Street, Charleston, SC 29401; John L. Norris, Esq., Hollins, Wagster and Yarbrough, P.C., 8th Floor, Third National Bank Building, Nashville, TN 37219; R. Stephen Doughty, Deputy Attorney General, 450 James Robertson Parkway, Nashville, TN 37219; Nathaniel Douglas, Ms. LeVern Younger and Ms. Miriam R. Eisenstein, Room 7732, General Litigation Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530; Joe B. Brown, Esq., United States Attorney, 879 U.S. Courthouse, Nashville, TN 37203; Carl A. Cowan, Esq., 1100 Crestview St., S.W., Knoxville, TN 37915; and Julian W. Blackshear, Jr., Esq., 201 Citizens Plaza, 400 Deaderick Street, Nashville, TN 37219; and Theodore M. Shaw, 99 Hudson St., 16th Floor, New York, NY 10013 this 9th day of July, 1986, via United States mail, first class, postage prepaid.



RICHARD E. JACKSON
Suite 200—Jefferson Plaza
939 Jefferson Street
Nashville, Tn 37203
(615) 254-1600

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dr. Ernest B. Terrell, et. al., Plaintiffs-Appellants,	)	
Rita Sanders Geier, et. al, Plaintiffs-Appellees,	)	
United States of America, Plaintiff-Intervenor-Appellees,	)	
Raymond Richardson, Jr., et. al., Plaintiff-Intervenors-Appellees,	)	
H. Coleman McGinnis, et. al, Plaintiff-Intervenors, Appellees,	)	
vs.	)	No. 84-6124
Lamar Alexander, et. al., Defendants-Appellees.	)	

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AFFIDAVIT OF ERNEST B. TERRELL IN SUPPORT OF MOTION FOR SUBSTITUTION OF PARTY

Affiant is informed and believes, on such information and belief and in good faith, states the following:

1. I ERNEST B. TERRELL, am presently residing

at P.O. Box 1254 in the city of Martinsburg, in the State of West Virginia.

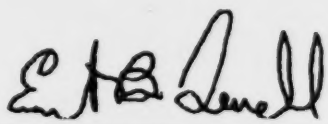
2. In 1968, I was named party in the **Geier, et. al vs. Alexander, et. al.** In the original complaint I was listed as:

> a citizen and resident of the State of Tennessee, and a citizen of the United States. He is presently enrolled and is a student at Tennessee A&I University. He sues on behalf of himself, and all students enrolled at Tennessee A&I University, as well as all Negro residents of the State of Tennessee similarly situated, which classes are too numerous to bring before the Court, Plaintiff being a member of the Negro race.

3. I have graduated and received a B.S. Degree from Tennessee State University on August 24, 1986.

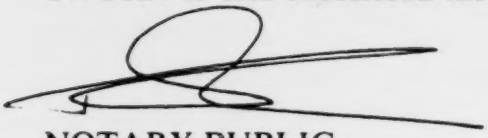
4. I believe I have a right to preserve the claim for the sub-class of students in the above named matter, but in the interest of assuring that a proper representative of the sub-class is a named litigant, I am willing to share, assign, and/or transfer, my rights and responsibilities to the present duly elected president of the Tennessee State University and to each and every future duly elected president of the Student Government Association of Tennessee State University.

AND FURTHER AFFIANT SAITH NOT.



Ernest B. Terrell
P.O. Box 1254
Martinsburg, WV 25461

SWORN to and subscribed me this 8th day of July, 1986.



NOTARY PUBLIC

My Commission Expires: 1-19-88

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dr. Ernest B. Terrell, et. al., Plaintiffs-Appellants,	)	
Rita Sanders Geier, et. al., Plaintiffs, Appellees,	)	
United States of America, Plaintiff-Intervenor-Appellee,	)	
Raymond Richardson, Jr., et. al., Plaintiff-Intervenors-Appellees,	)	
H. Coleman McGinnis, et. al., Plaintiff-Intervenors-Appellees,	)	
vs.	)	No. 84-6124
Lamar Alexander, et. al., Defendants-Appellees.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AFFIDAVIT OF GREGORY E. CARR IN SUPPORT OF MOTION FOR SUBSTITUTION OF PARTY

Affiant is informed and believes, and on such information and belief and in good faith, states the following:

1. I, GREGORY E. CARR am presently residing at 1103 Paris Ave. in the city of Nashville in the State of Tennessee.

2. I believe that the students at Tennessee State University have not been given an opportunity to be heard in the **Geier, et. al vs. Alexander, et. al** Stipulation of Settlement negotiations.

3. I was elected president of the Student Government Association of Tennessee State University on April 11, 1986 by the entire student body.

4. I have never been contacted by Attorney Barrett the class-action attorney regarding the above named case or regarding the Stipulation of Settlement negotiation.

5. I am willing to preserve the claim for the sub-class of students and be their named representatives in the above named case.

6. As the sub-class named representative I would retain the services of Attorney Richard E. Jackson.

AND FURTHER AFFIANT SAITH NOT.

Gregory E. Carr
1103 Paris Ave.
Nashville, TN

SWORN to and subscribed me this 8th day June, 1986

NOTARY PUBLIC

My Commission Expires: 1-19-88